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In The

Supreme Court of the United States

October Term, 1998

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, and SUNNYVALE PROPERTIES, LTD.,

Petitioners,

vs.

THE TOWN OF SUNNYVALE, TEXAS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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Appendix A — Preliminary Recommendations Of The Planning And Zoning Committee Of Sunnyvale Concerning The Mayhew Ranch Planned Development Application 1a

STATEMENT OF FACTS

Petitioners in this cause collectively owned approximately 1,196 acres of land in the rural community of Sunnyvale, Texas, located in the far eastern end of Dallas County with a population of only 2,000 persons. In 1987, they sought to rezone their land to a Planned Development classification which would authorize a minimum development of three to five times the density allowed under the existing one-acre zoning classification, or a total population increase of between 10,000 and 15,000 persons. After a long series of hearings, the Planning and Zoning Commission recommended denial of the proposed "upzoning" based on a variety of police power considerations, summarized by the Texas Supreme Court as: (1) the impact the development would have on the overall character of the community including the unique character and lifestyle of the Town as differing from the adjoining municipalities with a proliferation of multi-family and single-family homes on small lots; (2) concern for the ill effects of urbanization including quadrupling the population of the Town; and (3) preserving the rate and character of community growth which would otherwise exceed the capacity of adequate public facilities to service the community. At the Town Council hearing to consider the rezoning proposal, one of the Petitioners stated that anything less than approval of 3,600 units would be considered an "outright denial." The Council voted to deny the proposal on January 12, 1987. Petitioners filed suit, alleging, *inter alia*, that their property had been taken in violation of state and federal constitutional guarantees. The Supreme Court of Texas, in upholding the Dallas Court of Appeals' decision on the merits of Petitioners' claims, determined that the Town's denial of the rezoning application did not take Petitioners' land in violation of the Fifth and Fourteenth Amendments of the United States Constitution, or in violation of parallel state provisions.

SUMMARY OF ARGUMENT

Petitioners state two grounds for seeking United States Supreme Court review: (i) that the Town's denial of their rezoning application did not "substantially advance" legitimate state interests in violation of this Court's test for regulatory taking claims,[1] and (ii) that denial of Petitioners' rezoning application deprived them of procedural due process. The Texas Supreme Court's decision on each of these issues does not conflict with any applicable precedent of this Court.

Petitioners' claim that the Texas Supreme Court misapplied the "substantially advances" standard rests on two incorrect premises: (i) that the Court unlawfully substituted its judgment for the "findings" of the trial court, and (ii) that this Court's decisions in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), require heightened scrutiny of the Town's reasons for denying Petitioners' rezoning application. In fact, the trial court's findings regarding the legitimacy of the Town's purposes were found to be factually insufficient as a matter of state law by the Dallas Court of Appeals, which under the Texas constitution has final jurisdiction of such questions. The Texas Supreme Court further reviewed such findings in determining whether the Town's decision met the "substantially advances" test. Further, the "rough proportionality" and "essential nexus" tests articulated in *Dolan* and *Nollan* have no application to legislative decisions such as that rendered by the Town in

1. Petitioners' regulatory taking claim alleged both that the Town's denial of their zoning amendment failed to substantially advance a legitimate government interest and that it denied them economically viable use of their land. Here Petitioners have abandoned any contention that the Texas Supreme Court erred in deciding that Petitioners retained the economically viable use of their land. Nor do Petitioners dispute that the interests cited by the Town in rejecting the proposal are legitimate governmental objectives.

rejecting Petitioners' massive planned development "upzoning" proposal.

The standards applied and the decision rendered by the Texas Supreme Court in this case are completely consistent with this Court's most recent regulatory takings decisions. Consequently, no issues of special constitutional importance are raised. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

Finally, Petitioners' procedural due process claim depends entirely on the erroneous premise that their application for "upzoning" was quasi-judicial rather than legislative in character. Under Texas and federal law, however, rejection of a rezoning proposal, no less than the massive or grandiose application in this case, is a legislative decision of the Town Council. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986). As a basic rule, procedural due process guarantees do not apply to legislative decisions. In any event, even if Petitioners had some procedural due process rights, procedural due process is satisfied where, as here, a landowner was provided with notice and opportunity to be heard before the Town Planning and Zoning Commission and Town Council on multiple occasions before the Town denied the planned development application and, in addition, where judicial review of the rezoning denial was exhaustively and fairly granted.

ARGUMENT

I.

THE TEXAS SUPREME COURT CORRECTLY APPLIED THE "SUBSTANTIALLY ADVANCES" REGULATORY TAKING TEST.

A. Petitioners' Argument Rest on Two Incorrect Premises.

The Texas Supreme Court aptly summarized the "substantially advances a legitimate state interest" standard for regulatory takings as follows:

> The "substantial advancement" requirement examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. *See Yee v. City of Escondido*, 503 U.S. 519, 530, 112 S. Ct. 1522, 1529-30, 118 L. Ed. 2d 153 (1992); *see also generally Nollan*, 483 U.S. at 837, 107 S. Ct. at 3148-49; *Esposito*, 939 F.2d at 169. This requirement is not, however, equivalent to the "rational basis" standard applied to due process and equal protection claims. *Nollan*, 483 U.S. at 834 n.3, 107 S. Ct. at 3147 n.3. The standard requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective. *Id.*
>
> The Town's denial of the Mayhews' planned development application passes constitutional muster under this standard. In making this determination, we do not review the wisdom of the

> Town's decision. *See Smithfield Concerned Citizens*, 907 F.2d at 245. Rather, we are concerned only with whether the decision satisfies constitutional standards.

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 934 (Tex. 1998).

Petitioners do not quarrel with this formulation of the "substantially advances" standard. Rather, they characterize the Texas Supreme Court's application of the standard as "paying lip service to this Court's precedents." In attacking the Court's conclusion, Petitioners make two erroneous assumptions. First, they improperly rely on the trial court's findings of fact, which were set aside by the Dallas Court of Appeals. Second, they misconstrue this Court's precedents in *Nollan* and *Dolan* concerning the application of the "substantially advances" test.

1. *The trial court's findings cannot be accorded weight in determining whether the Texas Supreme Court correctly applied the "substantially advances" standard of review.*

Consistent with statutory requirements for a zoning amendment, Sunnyvale's Planning and Zoning Commission recommended that the Mayhews' application for planned development zoning be denied on a variety of police power grounds:

> In making its decision, the Commission attempted to take into consideration the general purpose of the planned development district classification which allows for flexible alternative zoning procedures and does encourage innovative design for the development of large tracts of land.

> They considered the needed preservation of open spaces and of the unique scenic environmental, cultural and historical significance of this community to itself and to the surrounding area. At the same time they are cognizant of the needs of the general public in so far as the health, morals, and welfare of the public is concerned, and the necessity to achieve an overall coordinated development of the community, eliminating, in so far as is possible, any negative impacts or piecemeal development which might result from rigid adherence to simple zoning classifications. The pedestrian and vehicular circulation traffic system must be kept safe and efficient. The financial soundness of the City itself must be a prime consideration and the impact of the development upon the school system and the municipal facilities is a matter of deep concern.
>
> Having considered all of these elements, as well as many others that were eluded [sic] to in the presentations made on behalf of the public and also the experts and the owners of the tract itself, the Planning and Zoning Commission is of the opinion that the planned development district as applied for should be denied. This recommendation comes as a result of a belief on the part of the Commission that if developed as applied for, the development would severely impact the ability of the City to provide adequate municipal services and would have a definite impact on the school system, its financial status, and its ability to absorb the increased population.

App. A, Preliminary Recommendation of the Planning and Zoning Committee of Sunnyvale Concerning the Mayhew Ranch Planned Development Application. The City Council

adopted the Commission's reasoning in voting to reject the application. The Texas Supreme Court upheld the reasoning of the Commission and the Council in applying the "substantially advances" standard.

Petitioners erroneously contend that the trial court's "findings" were entitled to deference by the Texas Supreme Court in determining whether the Town's denial of the Mayhews' rezoning application "substantially advanced" legitimate municipal interests. However, the trial court's decision to be expedient and adopt *carte blanche* Petitioners' proposed findings of fact and conclusions of law without support in the record did not withstand higher court review. The role of the trial court's findings was thoroughly considered and correctly resolved under state law, however, by both the Dallas Court of Appeals and the Texas Supreme Court. The Dallas Court of Appeals' opinion in fact negates the trial court's findings with respect to the issues presented in this Petition.

In its initial opinion, the Dallas Court of Appeals expressly recognized that the trial court's findings were entitled to the deference due a jury's findings. *Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 243 (Tex App. — Dallas 1994), *rev'd in part and aff'd in part*, 964 S.W.2d 922 (Tex. 1998). The Court conducted a review of the findings both on grounds of legal and factual insufficiency, ultimately concluding that the trial court's findings were factually insufficient to support the trial court's judgment under Texas law:

> In reviewing factual sufficiency points, we consider all the evidence, including any evidence contrary to the judgment. . . . We cannot set aside a finding unless it is so contrary to the overwhelming weight of the evidence that it is clearly wrong and unjust. . . . In reversing for factual insufficiency, the court of appeals must detail the evidence relevant

> to the issue in consideration and clearly state why the finding is factually insufficient.

Id. at 244 (citations omitted).

In its supplemental opinion, the Dallas Court of Appeals sustained the Town's factual insufficiency points with respect to the rationality of the Town's decision, focusing on the issue of sewage problems. The Court of Appeals observed, among other things, that the evidence at trial showed that (i) the Duck Creek plant had experienced problems with violations and breakdowns, (ii) the plant had been operating under the Environmental Protection Agency's supervision, and (iii) the Town's citizens were concerned about a stench that people thought the Duck Creek plant produced. *Mayhew*, 905 S.W. 2d at 264. The Court of Appeals then concluded:

> Based on all the evidence in the record, specifically that set forth above and in our initial opinion, we hold that the trial court's inferences from the facts and the resulting findings in this regard are against the great weight and preponderance of the evidence.

Id.

The Dallas Court of Appeals' decision, which is final under Texas law with respect to the issue of the factual insufficiency of the evidence to support the trial court's judgment,[2] negates

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2. *See, e.g.*, TEX. CONST. ART. 5, § 6 (West 1993) (decisions of the courts of appeals "shall be conclusive on all questions of fact brought before them on appeal or error"); *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996) ("Our decisions are limited by a paramount rule: We can consider only questions of law."); *Champlin Oil & Ref. Co. v. Chastain*, 403 S.W.2d 376, 390 (Tex. 1965) ("Questions of whether or

(Cont'd)

the trial court's findings with respect to the rationality of the Town's decision, at least as applied to the Town's perceived effect of the Mayhews' development on sewage problems.[3] (By necessary implication, the trial court substituted its judgment for that of the appointed and elected officials of Sunnyvale with respect to these matters.) Thus, the sole remaining issue is whether the Texas Supreme Court misapplied the "substantially advances" standard in the context of the whole record, notwithstanding the trial court's findings of fact.

2. *Petitioners misinterpret the nexus requirements of* Nollan *and* Dolan.

Petitioners argue that the Texas Supreme Court failed to apply heightened scrutiny in reviewing the rationality of the Town's denial of the Mayhews' re-zoning application, as required by this Court's decisions in *Nollan* and *Dolan*. In so doing, Petitioners misconstrue the nature of the "substantially advances" test.

In a regulatory taking case involving zoning, there are two general tests that must be met to establish a taking:

> The application of a general zoning law to particular property effects a taking if the ordinance does not

(Cont'd)

not a jury finding is against the overwhelming preponderance of the evidence lies [sic] within the exclusive jurisdiction of the Court of Civil Appeals.").

3. Although the Court of Appeals reviewed the findings primarily in the context of substantive due process claims, as was warranted by the form of the trial court's findings, the effect of its ruling is to negate the trial court's findings, and thereby conclusions based on such findings, regardless of the degree of scrutiny applied to the rationality of the Town's decision.

> substantially advance legitimate state interests, *see Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S. Ct. 447, 448, 72 L. Ed. 842 (1928), or denies an owner economically viable use of his land, *see Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n.36, 98 S. Ct. 2646, 2666, 57 L. Ed. 2d 631 (1978).

Agins, 447 U.S. at 260; *see also Yee*, 503 U.S. 519; *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

In *Nollan*, this Court observed that the "substantially advances" standard under regulatory takings review was not identical to the "rational basis" test traditionally applied to due process claims. 483 U.S. at 834, n.3. In *Dolan*, this Court summarized its two-part requirement for conditions exacting land that are attached to a development approval:

> In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.

Dolan, 512 U.S. at 386 (citing *Nollan*, 483 U.S. at 838).

As expressly recognized in *Dolan*, however, such analysis is not appropriate for review of legislative zoning determinations, or for municipal decisions that do not involve dedications of property. Referring to the general test for regulatory takings stated in *Agins* (downzoning land to one-

unit per acre does not constitute a taking), *inter alia*, the Court observed:

> The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioners' application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Agins, 512 U.S. at 385. By necessary implication, the "essential nexus" analysis in *Nollan* and the "rough proportionality" analysis in *Dolan* simply cannot be applied to evaluation of legislative determinations under the more general "substantially advances" standard.[4]

The *Nollan* and *Dolan* tests thus have no application to this case. First, the Town's rejection of the Mayhews' massive rezoning proposal, like an amendment approving a zoning change, is a legislative act under Texas law, not a quasi-judicial decision.[5] *McWhorter v. City of Winnsboro*, 525 S.W.2d 701,

4. In *Nollan*, the Court strongly implied that the "nexus test" was associated with the "substantially advances" standard. *See* 483 U.S. at 834. In *Dolan*, however, the Court did not further clarify the relationship between the general formulation of the standard, and the "nexus" and "rough proportionality" requirements. The *Nollan* and *Dolan* tests perhaps may best be understood as standards peculiar to takings claims premised on development exactions.

5. As is evident from their arguments, the Mayhews' claims rest heavily on their contention that the Town's denial of their planned (Cont'd)

703 (Tex. Civ. App. — Tyler 1975, writ ref'd n.r.e.) ("The determination of when the public interest does require an amendment of a zoning ordinance is within the legislative discretion of the municipality.") *Eudaly v. City of Colleyville*, 642 S.W.2d 75, 77 (Tex. Civ. App. — Fort Worth 1982, writ ref'd n.r.e.) (decision-making body free to make rezoning decision based on whatever factors it desires); *Charlestown Homeowners Ass'n v. LaCoke*, 507 S.W.2d 876, 879 (Tex. Civ. App. — Dallas 1974, writ ref'd n.r.e.) ("[t]he hearing required by article 1011(d) is legislative rather than judicial in character.") As the record reveals, the Mayhews' land constituted more than 15% of the vacant residential land in the Town. 964 S.W.2d at 925. The Mayhews' application for planned development zoning alone would have quadrupled the Town's existing population and numbers of housing units. 964 S.W.2d at 935. Second, unlike *Nollan* or *Dolan*, the facts in this case do not involve the imposition of *any* conditions, much less conditions relating to dedication of land for public use. Rather, the Town simply denied a massive rezoning proposal, thereby directly furthering the ends identified by the Planning and Zoning Commission in its recommendations on the Mayhews' proposed zoning amendment.[6]

(Cont'd)
development rezoning was not a legislative decision. See Petition at 15-17. Because Texas cases clearly favor the Town's position, i.e., that rezoning decisions are legislative acts, the Mayhews — citing state court decisions in other jurisdictions — appear to advocate that this Court establish federal criteria for classifying state land use actions. Not only is such determination beyond the scope of review in these proceedings, but a rezoning proposal the size of the Mayhews' is classified as legislative even in those jurisdictions that classify *some* zoning amendments as quasi-judicial. *See e.g., Neuberger v. City of Portland*, 603 P.2d 771 (Ore. 1979) (re-zoning proposal involving large acreage, because of its potential impacts on community, was legislative in character).

6. Correspondingly, this Court is not presented with "findings of fact" supporting imposition of a development exaction. Rather, the record
(Cont'd)

B. The Texas Supreme Court correctly concluded that the Town's denial of the Mayhews' re-zoning application substantially advanced legitimate municipal interests.

Once the hyperbole in the Mayhews' Petition is eliminated, it is clear that the Texas Supreme Court's evaluation of the Town's decision to deny the Mayhews' re-zoning application comports with federal standards, including those authorities cited by Petitioners. Accordingly, there is no occasion for review by this Court.

1. *Determination of whether the Town took the Mayhews' land is a question of law.*

The Texas Supreme Court initially determined that whether the Town's rejection of the Mayhews' re-zoning proposal "substantially advanced" a legitimate state interest was a question of law, relying both on Texas and federal cases.

> While we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property, *cf.*

(Cont'd)
contains a broad statement of reasons for rejection of the development application in the form of the Planning and Zoning Commission's reasons for denial, as is appropriate for zoning amendments. In this regard, Petitioners would borrow from *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), to support their contention that the Texas Supreme Court failed to go behind the Town's "findings." *See* Petition at 11-12. *Lucas* involved the very different question of a government's burden to justify the deprivation by regulation of loss of all economic use and value of land. *Lucas'* critique of legislative findings must be taken in such extreme context. In this case, Petitioners were not deprived of all use and value of their land, and have not contested the Texas Supreme Court's determination that denial of their rezoning deprived them of economically viable use of the property.

> *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997), the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law.

Mayhew, 964 S.W.2d at 933.[7] This ruling is in keeping with long-standing federal precedents. In case after case, the issue of whether a regulation substantially advanced a legitimate public purpose has been decided by courts as a matter of law. *See, e.g., Goldblatt v. Hempstead*, 369 U.S. 590, 595-596 (1962); *Agins*, 447 U.S. at 260-263; *Penn Central*, 438 U.S. at 122.

Where a constitutional question is involved, the appellate court is obliged to "apply the applicable rules of law upon the basis of an independent review of the facts of each case." *Jacobellis v. State of Ohio*, 378 U.S. 184, 189 (1964); *see also Connick v. Myers*, 461 U.S. 138, 150 n.10 (1983); *Norris v. State of Alabama*, 294 U.S. 587, 5990 (1935); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988). Mixed questions of law and fact must ultimately be decided by the court, not the fact finder, including issues of whether an action "substantially advances" a legitimate public interest. *See, e.g., New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1091 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2514 (1997); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221-22 (6th Cir. 1992); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1578 (11th Cir. 1989); *Bateson*, 857 F.2d 1303; *see also Midnight Session, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992).

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7. Petitioners apparently do not contest this part of the Court's ruling: "The question of whether a taking has occurred may ultimately be a question of law. . . ." Petition at 11.

2. *The interests asserted by the Town were legitimate governmental objectives.*

The Texas Supreme Court also correctly determined that the Town's reasons for denial of the Mayhew's re-zoning application were legitimate governmental interests. As stated in *Nollan*, "a broad range of governmental purposes and regulations" satisfy the requirement that a regulatory decision "substantially advance" a state interest. 483 U.S. at 835; *Agins*, 447 U.S. at 260-262. As recognized by the Texas Supreme Court, federal courts have consistently upheld objectives like those advanced by the Town's Planning and Zoning Commission as legitimate state interests:

> In *Agins*, the City of Tiburon adopted a zoning ordinance governing development of open space land that limited the plaintiffs to building between one and five single-family residences on the five acres of land which they had previously purchased for residential development. 447 U.S. at 257, 100 S. Ct. at 2139-40. The Court held that protecting the residents of Tiburon from the ill effects of urbanization by precluding the conversion of open-space land to urban uses was a legitimate government purpose. *Id.* at 261, 100 S. Ct. at 2141-42. *Cf. Penn Central Transp. Co.*, 438 U.S. at 129, 98 S. Ct. at 2662-62 (preservation of desirable aesthetic features); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S. Ct. 1536, 1541, 39 L. Ed. 2d 797 (1974); *Berman v. Parker*, 348 U.S. 26, 32-33, 75 S. Ct. 98, 102-03, 99 L. Ed. 27 (1954); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95, 47 S. Ct. 114, 120-21, 71 L. Ed. 303 (1926); *see also Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) (preservation of

> agricultural uses of land a legitimate state interest); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244-45 (1st Cir. 1990) (controlling both the rate and character of community growth a legitimate government purpose); *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418, 422 (2d Cir. 1983) (discouraging conversion of open-space land to urban uses a legitimate state interest). Such zoning ordinances benefit "the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas." *Agins*, 447 U.S. at 262, 100 S. Ct. at 2142.

Mayhew, 964 S.W.2d at 934. In fact, Petitioners admit that the "Town's growth management objectives were indeed a legitimate public interest." Petition at 10.

3. *The Town's denial of the Mayhews' rezoning application substantially advanced the stated reasons.*

The Texas Supreme Court concluded that the Town's decision to deny the Mayhews' rezoning application passed constitutional muster because: "Simply put, the Town has a substantial interest in preserving the rate and character of community growth, and its action in denying the Mayhews' planned development furthers those interests." 964 S.W. 2d at 935. In reaching this conclusion, the Court examined the record and the Town Planning and Zoning Commission's recommendations in particular:

> The Town denied the development application in part because of the impact the development would have on the overall character of the community including the unique character and lifestyle of the

> Town which is different from that of adjoining municipalities where there is a proliferation of multi-family and single-family homes on small lots. . . . The Mayhews requested a planned development with 3,600 units in a Town with a population of only approximately 2,000 residents. Photographs in the record show that the Town is uniquely rural and suburban, with undivided two lane roads, clusters of trees, lakes and ponds and houses on large lots. This community would change drastically if a large planned development with at least three residences per acre was built. The Mayhews' planned development would result in an estimated population of between 10,000 and 15,000 persons, more than quadrupling the population of the Town.

Mayhew, 964 S.W.2d at 935. *See also* App. A, Preliminary Recommendations of the Planning and Zoning Committee of Sunnyvale concerning the Mayhew Ranch Planned Development Application.

Petitioners do not explain how the Texas Supreme Court's reasoning set forth above violates the "substantially advances" standard, other than to complain that the trial court's findings require deference. As noted previously, however, this case differs markedly from *Dolan*, upon which Petitioners rely, in a variety of particulars. For one, determining whether a *denial* of a large project in a small town "substantially advances" a stated purpose is considerably more straightforward than measuring the degree of connection between an imposed *condition* of land dedication and the "nature and extent" of the development under consideration. *Dolan*, 512 U.S. at 391. Here, the types of reasons stated in the Planning and Zoning Commission's recommendations to the City Council were directly furthered by denial of the Mayhews' rezoning request, because the Town as a result would not be faced with the

perceived impacts that would flow from the massive development project thereafter.

Nothing in this Court's *Dolan* decision confutes the Texas Supreme Court's application of the "substantially advances" standard. In *Dolan*, this Court easily concluded that there was an essential nexus between the reason for the land dedication requirement and the proposed remodeling of the hardware shop:

> Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld. . . . It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year floodplain.

512 U.S. at 387 citing *Agins*, 447 U.S. at 260-262. And, although the Court in *Dolan* found fault with the municipality's imposition of land dedication requirements under the "rough proportionality" standard of review appropriate to development conditions, the denial of the Mayhews' land cannot be said to be other than roughly proportional to the Town's goals of preserving the unique rural character of its environment.

In reaching its conclusion, the Texas Supreme Court was appropriately concerned that the trial court had substituted its judgment for that of the local legislators. *Mayhew*, 964 S.W.2d at 934. This approach is in keeping with this Court's precedents, honoring the presumption of validity that attends legislative acts in takings cases. *See, e.g., Concrete Pipe*, 508 U.S. 637.[8]

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8. A local government's legislative action will not be construed to effectuate an economic taking as long as the governmental entity has (Cont'd)

The Texas Supreme Court thus correctly observed all tenets of federal law in determining that the Town's denial of the Mayhews' rezoning application substantially advanced legitimate municipal objectives.

II.

PETITIONERS CANNOT ESTABLISH A CLAIM ON PROCEDURAL DUE PROCESS GROUNDS BECAUSE THE TOWN'S DECISION WAS LEGISLATIVE.

Petitioners claim that the Town's denial of their rezoning application violated procedural due process guarantees, and that the Texas Supreme Court's decision upholding the Town's actions misapplied federal law. Petitioners' entire argument, however, is premised on the absurd notion that their request to greatly intensify zoning on their 1200-acre ranch was not a legislative act. Comparing their "upzoning" application to a special permit or variance request, Petitioners fail to cite a single Texas or federal decision that supports their position.[9] Because the Town's decision to reject the Mayhews' development

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(Cont'd)
reasonably concluded that "'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land." *Penn Central*, 438 U.S. 125.

9. Instead, Petitioners cite Oregon and Florida decisions, arguing that a planned development proposal *should* be quasi-judicial. While a few states (*e.g.*, Florida, Oregon and Washington) have established an exception known as the "*Fasano* Doctrine," which characterizes rezonings of small individual parcels of land as quasi-judicial, the doctrine typically applies only where the tracts involved are relatively small and the types of standards to be applied are not complex. Rohan, *Zoning and Land Use Controls*, § 39.02[2] — "The Minority Rule: Treatment As Quasi-Judicial Action" ("The highest courts in Oregon and Washington have been the chief advocates for the position.").

proposal was legislative under Texas and federal law, the Mayhews were not entitled to procedural due process. At most, Petitioners were entitled to notice and fair hearing, which they admit they received.

As expressly declared by the Texas Supreme Court, "[z]oning is a legislative act" under Texas law. *Mayhew*, 964 S.W. 2d at 939 (citing *Thompson v. City of Palestine*, 510 S.W.2d 579, 581 (Tex. 1974)). *See also Conway v. Hospital Corp. of Am.*, 577 S.W. 2d 534 (Tex. Civ. App. — Texarkana, writ ref'd n.r.e.), *appeal dism'd*, 444 U.S. 803 (1979). Rezoning property to a planned development zoning district is no less a legislative decision of the municipal governing body. *See Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340 (Tex. App. — Austin 1995, no writ); *Jurkiewicz v. Butler County Board of Elections*, 620 N.E.2d 146 (Ohio 1993) (approval of a PUD was a legislative act rather than a mere determination that it "met the standards of compliance;" consequently, the decision to designate an area as a PUD was a legislative act subject to referendum). *See generally South Gwinett Venture v. Prewitt*, 491 F.2d 5 (5th Cir.), *cert. denied*, 419 U.S. 837 (1974); *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); *Smithfield Concerned Citizens for Fair Housing v. Town of Smithfield*, 907 F.2d 239 (1st Cir. 1990); *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1990). *See Village of Euclid*, 272 U.S. 365; *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976). *See generally* Rohan, *Zoning and Land Use Controls*, § 39.01[2].

Because the Town's rejection of the Mayhews' rezoning proposal was a legislative act, Petitioners were not entitled to any procedural due process. *Lawton v. City of Austin*, 404 S.W. 2d 648, 651 (Tex. Civ. App. — Austin 1996, writ ref'd n.r.e.); *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111,

1117 (10th Cir. 1991) (shopping center rezoning not entitled to due process of law). Technical failure to comply with state and local notice or hearing requirements does not constitute deprivation of federal due process. *Morrow v. Bassman*, 515 F. Supp. 587 (S.D. Ohio 1981), *aff'd*, 785 F.2d 309 (6th Cir. 1986); *Adler v. Lynch*, 415 F. Supp. 705 (D. Neb. 1976). Even if Petitioners had some procedural due process rights, procedural due process is satisfied where state judicial review of the rezoning denial is granted. *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 830 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *GM Engineers & Assoc. v. West Bloomfield Township*, 922 F.2d 328 (6th Cir. 1990).

Even if procedural due process must be afforded in a legislative determination, the Texas Supreme Court properly held that the Town was only required to "provide notice and an opportunity to be heard, which it did." *Mayhew*, 964 S.W.2d at 940. *See also Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The record amply reveals that throughout this process, Petitioners were provided numerous notices, hearings, meetings, negotiations and other opportunities to articulate and support their position both before the Planning and Zoning Commission and the Town Council. Consequently, Petitioners were afforded all process that was due under the United States Constitution, as correctly determined by the Texas Supreme Court.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — PRELIMINARY RECOMMENDATIONS OF THE PLANNING AND ZONING COMMITTEE OF SUNNYVALE CONCERNING THE MAYHEW RANCH PLANNED DEVELOPMENT APPLICATION

The Planning and Zoning Committee met at the City Hall on Thursday, November 13th, to discuss and consider all of the information that had been furnished to them by the applicant in the Mayhew Ranch Application. To consider the testimony and comments from the public as have been received in public meeting and to discuss among themselves the impact of the planned development upon the City of Sunnyvale based upon their independent knowledge of the area, its needs and its future direction.

In making its decision, the Commission attempted to take into consideration the general purpose of the planned development district classification which allows for flexible alternative zoning procedures and does encourage innovative design for the development of large tracts of land. They considered the needed preservation of open spaces and of the unique scenic environmental, cultural and historical significance of this community to itself and to the surrounding area. At the same time they are cognizant of the needs of the general public in so far as the health, morals, and welfare of the public is concerned, and the necessity to achieve an overall coordinated development of the community, eliminating, in so far as is possible, any negative impacts or piecemeal development which might result from rigid adherence to simple zoning classifications. The pedestrian and vehicular circulation traffic system must be kept safe and efficient. The financial soundness of the City itself must be a prime consideration and the impact of the development upon the school system and the municipal facilities is a matter of deep concern.

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Having considered all of these elements, as well as many others that were eluded to in the presentations made on behalf of the public and also the experts and the owners of the tract itself, the Planning and Zoning Commission is of the opinion that the planned development district as applied for should be denied. This recommendation comes as a result of a belief on the part of the Commission that if developed as applied for, the development would severely impact the ability of the City to provide adequate municipal services and would have a definite impact on the school system, its financial status, and its ability to absorb the increased population. The City of Sunnyvale has a very unique character and a lifestyle which is different from that of the adjoining municipalities where there is a proliferation of multi-family and single family homes on small lots. In order to maintain this overall character of a more relaxed living style, and at the same time allow reasonable use of the lands involved in the planned development a less dense use would certainly be preferred.

The Duck Creek Treatment Plant already creates an environmental problem. The overabundance of multi-family dwellings in the near neighborhood causes financial concerns for the municipalities. The development costs associated with off-site streets and other municipal services to accommodate the more dense use of the tract certainly would have an impact upon the City budget and its ability to meet those needs. The surrounding areas would be impacted without a balancing contribution to the health, welfare, morals and wellbeing of the community as such.

Prior to making a final recommendation to the City Council, it is the desire of the Planning and Zoning Commission to gather any additional input that the general public might have at a

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meeting to be held on the evening of November 20th, 1986, at the school gymnasium at 7:00 p.m. Following that hearing, the Planning and Zoning Commission will make any changes in the recommendations that it deems advisable and then submit this recommendation to the City Council after taking an official vote on the same.